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MAY CONGRESS CONSTITUTIONALLY PROHIBIT
ALIEN ENEMIES TO VOTE AT FED-
ERAL ELECTIONS?

CHAIRMAN FLOOD, of the Committee on Foreign Affairs of the House of Representatives, has recently introduced a bill to prohibit persons, not citizens of the United States but subjects of a state or nation with which the United States are at war, to vote at elections of Representatives or Senators or of electors of President and Vice-President. The need of the restriction lies in the fact that in some eight or ten States of the Union the right of suffrage has been conferred by the laws of those States upon aliens who have taken out their first naturalization papers, many of whom are subjects of the German and Austro-Hungarian Empires, who, in some districts at least, might vote in sufficient numbers to determine the elections.

Yet, notwithstanding the manifest need of some restriction of the sort, it will probably come with a distinct shock to those who, like the writer, believe in the firm maintenance of the reserved rights of the States, that Congress should undertake to deal with this question and to disqualify voters in federal elections whom the States have seen fit to qualify as voters within their limits.

The difficulty of Congressional action in the matter becomes at once apparent upon reference to the provisions of the Constitution on the subject. In respect to the election of Congressmen and Senators, the Constitution¹ declares that they shall be elected by the people of each State and that "the electors [voters] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature;" and in respect to the President and Vice-President, that "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."² As is well known, each State at present re-

¹ Art. I, § 2, cl. 1; Amendment XVII.

² Art. II, § 1, cl. 2.

quires that its presidential electors shall be elected by the people, instead of being appointed by the Governor or chosen by the legislature, though all these modes (or others) would be within the discretion of the legislature of each State.

At first glance, therefore, it would appear that the qualifications of voters at all federal elections are within the exclusive control of the States themselves, and that Congress would have no power to invade that jurisdiction, even though the exercise of the discretion by some States may be unwise or detrimental to the interests of the whole or may interfere with the government's successful conduct of the war. And while there seem to be no judicial decisions on the subject, most of the commentators have assumed that the power to prescribe qualifications for voters even at federal elections is exclusively vested in the several States, with which Congress has no power to interfere.

For example, Mr. John Randolph Tucker, discussing Art. I, § 2, of the Constitution, says: ³

"As the representatives are, as we have shown, representatives of the States according to their respective numbers and are to be elected by the people of the several States, it is obvious that the people of the State should designate the voters who should voice its will. It was therefore out of the question that the Constitution should fix the right of suffrage for these elections, and *a fortiori* that Congress should have the power to do so, and hence the right of suffrage was accorded to those whom the constitution of the State, for the time being, qualified to vote for the most numerous branch of the State legislature. * * * The exclusive power in fixing suffrage for the House of Representatives is in the State, and the other States as parties to the Constitution agreed that the action of the State as to its own government should be the rule for the federal Congress."

On the other hand, however, Judge Cooley, speaking of the very practice which this bill proposes to modify, says: ⁴

"Some of the States also permit aliens, after a short residence therein and after declaring their intention to become citizens, to exercise the elective franchise. When an alien is thus

³ 1 TUCKER, CONSTITUTION, 394.

⁴ PRINCIPLES OF CONSTITUTIONAL LAW, 3 ed., 89.

given the privilege permanently to reside within a State and to hold property of all kinds therein and to exercise the privilege of suffrage, the distinction in right and privilege and immunity between him and a citizen is not very plain. Indeed as the suffrage would seem peculiarly to belong to citizens, and as the voter for representatives in the State legislature may vote for representatives in Congress also, it would seem that there might be some question whether a State could confer upon an alien this high privilege. It is a question however which has never been made."

It will be seen from these quotations from eminent commentators that they are not all agreed in regard to the absolute supremacy of the several States over the qualifications of voters in federal elections. It is the purpose of this article to discuss briefly the extent of the State jurisdiction in this matter and to inquire whether Congress can rightfully exercise the power in any case to disqualify voters at federal elections who are qualified under State laws to take part in elections for the most numerous branch of the State legislature.

It is to be observed, in the first place, that the bill now under discussion does not propose to confer the right to vote upon any one. That the privilege of suffrage is not conferred by the Constitution (even under the fifteenth amendment) and that Congress has no power to confer it is too well settled to admit of argument.⁵

But from the fact that the States have the exclusive power to *qualify* persons for the suffrage, it is not a necessary inference that Congress has no power to *disqualify* some of those qualified by the States, if such disqualification is a necessary consequence of, or needful to, the exercise of the powers which Congress may properly and constitutionally exercise.

The Constitution has expressly conferred upon Congress the power to declare war⁶ and to raise and support armies,⁷ and upon the President, as commander-in-chief of the army and navy,⁸ the power to conduct the war successfully. It has also

⁵ *Minor v. Happersett*, 21 Wall. 162; *Ex parte Yarborough*, 110 U. S. 651.

⁶ Art. I, § 8, cl. 11.

⁷ Art. I, § 8, cl. 12

⁸ Art. II, § 2, cl. 1.

conferred upon Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers [of Congress] and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."⁹ Congress could not however, under this last clause, pass laws that it is prohibited to pass under other clauses of the Constitution, such as *ex post facto* laws;¹⁰ and if the control of the States over voters in federal elections is plenary, absolute and exclusive under the Constitution, it would amount to such a prohibition upon Congress.

The acid test therefore would seem to be, Is this State control so plenary, absolute and exclusive that no acts of the United States government within the scope of its granted powers, can prevent or interfere with the exercise of suffrage in federal elections by those persons who are qualified under State laws? If so, then every alien enemy now interned by the federal government is legally entitled on *habeas corpus* to his liberty on election day so that he may go home and vote, the federal government having no right to interfere with the supremacy of the State in this regard. So every conscript in the United States National Army would have the same right, and the government would have no right to prevent him. Should a State pass laws whereby convicts in penitentiaries located there would be permitted to go to their homes under guard and vote, a federal penitentiary located there must follow suit, and the federal government could not forbid its convicts qualified to vote in that State to exercise the same privilege.

These results are of course absurd, and yet they serve to make it manifest that there are at least some respects wherein the federal government has the power more or less to disturb or interfere with the assumed exclusive power of the States in fixing suffrage for the House of Representatives and Senate. And if we ask why can the government thus disturb and interfere with the State's suffrage-fixing power, the answer is, because it is necessary and proper in order to carry out powers

⁹ Art. I, § 8, cl. 18.

¹⁰ Art. I, § 9.

that are vested in the federal government by the Constitution. If this be true in some respects, why should it not be true in the exercise of the power to conduct the war to a successful conclusion? If, in order to accomplish this, it is necessary and proper that alien enemies be forbidden to vote in federal elections, it would seem to fall substantially within the same category as the case of the interned Germans or the conscripted men of the National Army, whose right to vote under their State laws is interfered with by governmental action of the United States. All these instances must stand or fall together.

If we examine closely the language of the Constitution, these conclusions will perhaps appear more certain. As already shown, it has generally been assumed by commentators that the clauses in the Constitution relating to the qualifications of voters in federal elections¹¹ are equivalent to a declaration that "all persons having the qualifications requisite, under State laws, to vote for the most numerous branch of the State legislature, shall have the right to vote in federal elections."

But so far as Congressional elections are concerned, postponing for the moment consideration of the presidential elections, the constitutional provisions read: "The electors [voters] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature," which is rather equivalent to the declaration that "no persons shall have the right to vote in federal elections, who have not the qualifications requisite, under State laws, to vote for the most numerous branch of the State legislature,"—a declaration very different in effect from that first above mentioned.

In other words, were the first declaration the equivalent of the constitutional provision, the State control would indeed be supreme, as has been so constantly assumed; but if the last mentioned declaration be the true equivalent, while it would follow that Congress could not authorize any person to vote in Congressional elections in any State who had not the qualifications prescribed by the State law, it would not follow that Congress, in the exercise of its admitted powers, (or in cases

¹¹ Art. I, § 2, cl. 1; Amendment XVII; Art. II, § 1, cl. 2.

where such action would be necessary and proper to carry into execution its admitted powers), could not prohibit persons to vote in any State who possess those qualifications. While Congress cannot *extend* the class of voters qualified under the State law, it might *restrict* it by cutting out persons having all those qualifications, but possessed of other disqualifications in conflict with admitted federal powers such as the power to conduct war.

With respect to presidential elections also, the Constitution apparently on its face seems to leave the qualifications of the voters in the several States to the discretion of their legislatures. It provides that "Each State shall appoint in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."¹²

Undoubtedly the intent here is to give the State legislature very wide discretion as to the *manner* of appointment of these electors, that is, whether by appointment by the governor, the legislature, a select body of citizens or by election by the people of the State either as a whole or by districts. Yet wide as this discretion is, there must manifestly be some limit to it. To take an extreme case, suppose a State legislature, under the control of pro-Germans, to provide that the presidential electors are to be appointed by the Kaiser. Even in times of peace, much less in times like these, can it be imagined that this could possibly be within the intent or meaning of the Constitution? Must it not be supposed that somewhere there would rest a power to prevent such an abuse of discretion?

But aside from such extreme suppositions, if the clause be narrowly scrutinized, it will be seen that the discretion vested in the State legislatures is confined to the *manner* of appointment, that is, the legislature may determine whether the choice of electors shall be made by popular election or otherwise. When this choice has once been made, however, and the elective method chosen, it would seem that Congress, if it were necessary and proper to carry into execution powers vested in

¹² Art. II, § 1, cl. 2.

the federal government or any department or officer thereof, might here as readily as in case of Congressional elections impose disqualifications upon the voters. No reason is perceived why the State legislative power to fix qualifications for voters in this case should be any more extensive than under the clauses dealing with Congressional elections.

It is submitted, with due deference, that, despite any predilections we may have in favor of the preservation intact of the rights reserved by the States in adopting the Constitution, the conclusion that Congress has power to pass this bill is justified on constitutional, as it certainly is on moral and political, grounds.

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